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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* JUSTICE FOR ALL IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I.

Did an instruction expressly directing sentencing jurors that they should consider "any mitigating circumstances" and "assess[] the defendant's personal culpability" in answering the special issues put to them under Texas law satisfy this Court's directive in *Penry v. Lynaugh* that the jury must be able to give effect to petitioner's mitigating evidence of his mental retardation and abused childhood?

II.

Did it violate petitioner's Fifth Amendment rights for the prosecution to introduce a defense-requested, court-ordered psychiatric evaluation to rebut psychiatric evidence introduced by petitioner?

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Justice for All is an all-volunteer, not for profit Texas corporation founded in 1993. Justice for All is a criminal justice reform organization whose purposes include providing support to the survivors of homicide victims and to the victims of other violent crimes through the challenges they must face on a regular basis, including offering assistance in obtaining victim's compensation, providing community outreach, advising on trial procedures, and assisting in parole and clemency hearings. Justice for All provides education and emotional support to victims throughout the process. In addition, its mission is to act as an advocate for change in the criminal justice system to ensure that the rights of victims and law abiding citizens are recognized and protected without infringing upon the rights of the accused.

This case involves important issues concerning the application of the death penalty in the State of Texas. A decision overturning the court of appeals' ruling could seriously impair the ability of the State to bring convicted murderers to justice with the penalty established under Texas law. As a result, such a decision could further prolong the ordeal of the families of murder victims who seek to bring closure to the traumatic events that have shattered their lives. This Court has recognized that in punishing criminal offenders the State plays a role in vindicating the rights of victims. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 366 (1993). Justice for All has an interest in ensuring that the efforts of the State of Texas to vindicate those rights through the administration of its criminal laws are not unduly hampered.

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

STATEMENT OF THE CASE

On October 25, 1979, petitioner brutally raped and murdered 22-year-old Pamela Carpenter in her own home. Petitioner's confessions, later introduced at his trial, revealed that he had decided to go to Ms. Carpenter's house to "get me a piece." J.A. 1:13. Petitioner forced his way into Ms. Carpenter's house, grabbed her by the neck, and held a knife to her throat. Struggling to defend herself, Ms. Carpenter managed to grab a pair of scissors and to stab petitioner. Petitioner, however, knocked the scissors from her hand and overpowered her. He then dragged her to a bedroom. After beating her and – in his own words – "stomping" her,[2] petitioner raped Ms. Carpenter for half an hour. Petitioner then left the room, retrieved the scissors Ms. Carpenter had used in a desperate effort to save herself, and mortally stabbed her in the chest. *See Penry v. State*, 691 S.W.2d 636, 641 (Tex. Crim. App. 1985) (*en banc*). Petitioner then fled.

Ms. Carpenter, however, did not die immediately. She was able to pull the scissors from her chest, struggle to the telephone, and call a friend for help. J.A. 1:15; R.42:130-32. Before she died at the hospital two hours later, she was able to give a description of her attacker. That description led to petitioner's arrest.

Petitioner was tried, convicted of capital murder, and sentenced to death. *See* 691 S.W.2d at 640-41. On federal *habeas corpus* review, this Court vacated petitioner's sentence. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). Under Texas law, petitioner's sentence had been fixed after the jury had answered three "special issues" in the affirmative. The issues asked the jury to evaluate: (1) whether petitioner had acted "deliberately;" (2) whether he would be dangerous in the future; and, (3)

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[2] An autopsy later revealed that a blow from petitioner's boot had ruptured Ms. Carpenter's kidney.

whether his conduct was "unreasonable in response to the provocation, if any, by the deceased." A majority of the Court concluded that, "without any jury instructions on mitigating evidence," *id.* at 322, "we cannot be sure" that the special issues permitted the jury to give mitigating effect to petitioner's particular evidence concerning his mental retardation and abused childhood," *id.* at 323.

Upon resentencing, the court presented the jury with the same special issues. But the court also instructed the jury that, in considering these issues, the jurors were to take into account "any mitigating circumstances," to "give effect and consideration to them in assessing the defendant's personal culpability," and to return a negative finding to a special issue if they concluded that a death sentence was not "an appropriate response to the personal culpability of the defendant." The jury again answered the issues in the affirmative, and petitioner was sentenced to death.

SUMMARY OF ARGUMENT

1. The instructions at petitioner's sentencing fully addressed the constitutional defects identified in *Penry*. The error in petitioner's first sentence was that "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," 492 U.S. at 328, the Court could not be sure that the inquiries outlined in the special issues permitted the jury to incorporate petitioner's mitigating evidence into the sentencing decision.

The instruction here addressed that concern directly by telling the jurors that in considering the special issues they were to consider "any mitigating circumstances" and to incorporate into their answers an "assess[ment] [of] the defendant's personal culpability." That instruction defined the scope of the inquiry the jury was properly to undertake and ensured that – particularly in evaluating whether petitioner acted

"deliberately" – the jurors could give a nuanced response that reflected their evaluation of any factors that tended to reduce petitioner's moral culpability. It ensured, in short, that (as the trial court directed) their evaluation of petitioner's "deliberateness" reflected their assessment of whether the death sentence was "an appropriate response to the personal culpability of the defendant." The instruction thus accomplished exactly what *Penry* required: it ensured that the jury was provided a vehicle for giving a "reasoned moral response" to petitioner's mitigating evidence.

2. The introduction at sentencing of a psychiatric evaluation of petitioner conducted while petitioner was in custody on a prior, unrelated charge did not violate petitioner's Fifth Amendment rights. The report was properly introduced under *Buchanan v. Kentucky*, 483 U.S. 402 (1987), as rebuttal to psychiatric evidence introduced by petitioner himself. There is no merit in the claim that use of the report on the subject of future dangerousness was not rebuttal simply because petitioner did not introduce a psychiatric opinion expressly directed to that precise subject. Petitioner put his mental status in issue and sought to establish that his violent behavior was related to his mental retardation and abused background. It was fair rebuttal for the prosecution to use psychiatric evidence to explore another consequence of any link between petitioner's mental status and his violent behavior – namely, his future dangerousness.

In any event, even if there was some error in introducing the report, the error was harmless. The report was merely cumulative of other evidence, including other expert testimony, indicating petitioner's future dangerousness.

ARGUMENT

Under 28 U.S.C. § 2254(d), petitioner may not obtain relief on his claims on federal *habeas* review unless the state ruling he is challenging "was contrary to, or involved and

unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). *See also Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Petitioner cannot satisfy that standard on any of his claims.

I. THE JURY INSTRUCTION AT PETITIONER'S SENTENCING SATISFIED ALL CONSTITUTIONAL DICTATES, INCLUDING *PENRY*, BY ALLOWING THE JURY TO GIVE EFFECT TO ALL RELEVANT MITIGATING EVIDENCE.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court overturned petitioner's original death sentence on the ground that the special issues presented to the sentencing jury foreclosed the jury from giving effect to petitioner's mitigating evidence of his mental retardation and abused childhood. The Court concluded that, absent some further instruction from the trial court, there was a reasonable likelihood that the first issue (which inquired into whether petitioner acted "deliberately") would not be understood broadly enough to give effect to petitioner's evidence suggesting his reduced culpability. *See id.* at 322-23. The second issue (which inquired into petitioner's future dangerousness) also provided no vehicle for giving effect to petitioner's particular mitigating evidence, the Court concluded, because petitioner's inability to learn from his mistakes actually tended to suggest that he *would* be dangerous in the future. *See id.* at 323-24. Lastly, the third issue, which directed the jury to consider whether petitioner's conduct was an unreasonable response to provocation, also did not provide an effective mechanism for considering petitioner's evidence because the jury might believe that petitioner's retardation had no bearing on whether he acted reasonably. *See id.* at 324-35. The Court thus concluded that the sentencing court erred by failing to give instructions "informing the jury that it could consider and give effect to the mitigating evidence of Penry's

mental retardation and abused background by declining to impose the death penalty." *Id.* at 328.

As the Court has later explained, it has consistently taken a "limited view of *Penry* and its scope." *Johnson v. Texas*, 509 U.S. 350, 365 (1993). The constitutional infirmity in *Penry* was that, at least without additional instructions from the court, there was a reasonable likelihood that the jury was entirely precluded by the framing of the special issues from incorporating petitioner's particular mitigating evidence into its sentencing decision. As the Court put it in *Graham v. Collins*, 506 U.S. 461 (1993), "the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Id.* at 475. Thus, the Court has explained that *Penry* and similar cases "stand *only* for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson*, 509 U.S. at 361(quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)) (emphasis added). *See also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination not *preclude* the jury from being able to give effect to mitigating evidence." (emphasis added)).

The *Penry* Court never suggested that the Texas special issues focusing the jury's evaluation of the evidence on certain questions were inherently cast in such a way that they could not serve as proper vehicles for addressing Penry's mitigating evidence. To the contrary, the Court repeatedly noted that it was holding solely that the special issues were insufficient "in the absence of appropriate jury instructions." *Penry*, 492 U.S. at 326. *See also id.* at 322 (special issues inadequate "without any jury instructions on mitigating evidence"); *id.* at 328 (issues inadequate "in the absence of instructions informing the

jury that it could consider and give effect to . . . mitigating evidence"). And *Penry* certainly did not abandon the fundamental principle, reaffirmed just last Term, that "the State may structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to it." *Weeks v. Angelone*, 528 U.S. 225, 232 (2000).

The jury instruction given in this case fully addressed the constitutional error identified in *Penry*. After setting out the special issues that the jury was to consider, the Court instructed the jury as follows:

> You are . . . instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, *should be reflective of your finding as to the personal culpability of the defendant*, Johnny Paul Penry, in this case.
>
> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the three special questions.

J.A. 3:676-77 (emphasis added).

The Court has made clear that the standard for determining whether these instructions satisfy constitutional demands is "'whether there is a reasonable likelihood that the

jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Weeks*, 528 U.S. at 232 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). In applying that standard, moreover, the Court has rejected a "technical parsing of th[e] language of the instructions," and instead "approach[es] the instructions in the same way that the jury would – with a 'commonsense understanding of the instructions in light of all that has taken place at the trial.'" *Johnson*, 509 U.S. at 368 (quoting *Boyde*, 494 U.S. at 381).

Under that standard, it is plain that the court's instruction permitted the jury to give full effect to petitioner's mitigating evidence. The court made clear that the jury was to take into account "any mitigating circumstances" in an "assess[ment] [of] the defendant's personal culpability" and to incorporate that assessment into its consideration of the special issues. Indeed, the court directed the jurors expressly that the answers to the special issues "should be reflective of your finding as to the personal culpability of the defendant."

That instruction necessarily shaped the jurors' understanding of the nature of the inquiry they were being asked to pursue in answering the issues – and in particular in determining whether petitioner acted "deliberately." It made it clear that the inquiry under the first special issue was to be a broad-ranging one that took into account any circumstances that bore on petitioner's moral responsibility for the crime. After all, the commonsense understanding of the question whether petitioner acted "deliberately" would, without more, include some evaluation of whether petitioner acted with a considered understanding of the consequences of his actions.[3]

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[3] *Cf. Merriam Webster's Collegiate Dictionary* 305 (10th ed. 1994) (defining "deliberate" as "characterized by or resulting from careful and thorough consideration" and "characterized by awareness of the (continued...)

In everyday usage, the actions of a person who has a reduced comprehension of the consequences of his conduct (a child, for example) would usually not be called "deliberate." And when the direction to assess whether petitioner acted "deliberately" was combined with a further instruction to use "any mitigating circumstances" to evaluate the petitioner's "personal culpability" in answering that question, it is plain that the question was broad enough to allow the jury to consider and give effect to petitioner's mitigating evidence in responding to the first special issue.

The trial court's instruction thus directly responded to the constitutional defect identified in *Penry*. As the *Penry* Court explained, the infirmity it found was that, without a further instruction "clearly direct[ing] the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability," the Court could not "be sure that the jury was able to give effect to the mitigating evidence" in the framework of the special issues. 492 U.S. at 323. The instruction here directed the jury precisely to take into account all mitigating evidence in an assessment of petitioner's "personal culpability" as it considered whether or not he acted "deliberately." That fully satisfied *Penry*'s dictates.

It bears emphasizing, moreover, that the Court has long recognized that a "commonsense understanding" of the Texas special issues must acknowledge that the issues – even without the additional instruction given here – required jurors "to 'exercise a range of judgment and discretion.'" *Johnson*, 509 U.S. at 370 (quoting *Adams v. Texas*, 448 U.S. 38, 46 (1980)). As the Court stressed in *Johnson*, "we cannot forget that 'a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner

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[3] (...continued)
consequences").

similar to that employed by capital juries in 'pure balancing' States.'" *Id.* at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality opinion)).

Especially when the special issues were supplemented with an express instruction requiring the jury to incorporate an assessment of the defendant's culpability into its consideration of whether the defendant acted "deliberately," it is clear that the instruction as a whole permitted the jury to give a nuanced response to the first special issue – a response that would fully take into account factors that might reduce petitioner's moral culpability. In short, the jury was directed to do precisely what *Penry* required – namely, provide a "reasoned moral response," 492 U.S. at 328, to petitioner's mitigating evidence in rendering its sentencing decision. Thus, it cannot be said that there is a "reasonable likelihood" that jurors believed they were precluded from giving effect to petitioner's evidence.[4]

Petitioner's claims that the instruction failed to cure the defects in his sentencing are meritless. First, petitioner focuses on language from *Penry* suggesting that the constitutional defect in the original sentence could be cured by an instruction giving a broad definition to the term "deliberately" in the first special issue. *See* 492 U.S. at 323. From there, petitioner makes a wholly unwarranted logical leap to insist that without an instruction expressly addressing that particular term, the use of the special issues in his resentencing was unconstitutional. Contrary to petitioner's claims, however, nothing in *Penry* remotely suggested that the *only* constitutionally permissible way to solve the infirmity in the first special issue was to give the jury a specific instruction on the meaning of the term "deliberately." The defect was that, absent some further

[4] *Cf. Weeks v. Angelone*, 528 U.S. 225, 236 (2000) (explaining that a "slight possibility that the jury considered itself precluded from considering mitigating evidence" is "insufficient to prove a constitutional violation under *Boyde*").

instruction from the trial court, a reviewing court could not "be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." 492 U.S. at 323. As explained above, by explicitly directing the jury to incorporate consideration of petitioner's "personal culpability" based on "any mitigating circumstances" into its assessment of whether petitioner acted "deliberately," the trial court directly responded to that concern. An express definition of the term "deliberately" itself thus bore no talismanic significance for resolving the constitutional concerns identified in *Penry*.

Next, petitioner seizes on the fact that the Texas Court of Criminal Appeals described the instruction given here as a "nullification" instruction and claims that the instruction was infirm because it allowed the jury to give effect to his mitigating evidence only by returning a "false" answer to one of the special issues – that is, by answering "no" to a special issue even if the jurors believed that the true response to the question asked was "yes." Pet'r Br. 22-27. Petitioner, however, paints this picture of a conflict between the "correct" response to the issues and a "no" answer from the jury only by *assuming* an unduly narrow conception of the inquiry permitted by the special issues. In effect, he portrays the special issue asking whether the defendant acted "deliberately" as amounting to little more than an inquiry into whether petitioner acted with volition and motor control over his actions in committing the crime. But a "commonsense understanding of the instructions in light of all that has taken place at the trial," *Boyde*, 494 U.S. at 381, readily shows that this assumption is wholly misplaced.

To begin with, as noted above, even without the additional instruction given in this case, the Court has recognized that a jury considering the special issues ""is likely to weigh mitigating evidence as it formulates [its] answers in a manner similar to that employed by capital juries in 'pure balancing' States.'" *Johnson*, 509 U.S. at 370-71 (quoting

Franklin, 487 U.S. at 182 n.12 (plurality opinion)). *See also Lockhart v. McCree*, 476 U.S. 162, 183 (1986) (noting (approvingly) that the Texas system, "although purporting to limit the jury's role to answering several 'factual' questions, in reality vested the jury with considerable discretion over the punishment to be imposed on the defendant"). Indeed, even one of the staunchest opponents of the death penalty on this Court recognized that the Texas special issues did not constrain the jury to merely providing a technical answer to a narrow factual question. Rather, as the Court noted in *Johnson*, 509 U.S. at 371, Justice Brennan's dissent for four Justices in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), described the Texas system as one permitting the sentencing jury to exercise judgment – specifically by demanding an evaluation of the "deliberateness" of the defendant's actions. Thus, Justice Brennan noted that the special issues "require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability." *Id.* at 322 (Brennan, J., dissenting).

The narrow conception of the "deliberateness" inquiry that underpins petitioner's claims is thus rather dubious even as a matter of this Court's traditional understanding of the Texas special issues. The additional instruction given in this case makes it even plainer that the inquiry into whether petitioner acted "deliberately" cannot be understood as narrowly as petitioner would like. As explained above, the court's direction to the jurors to consider "any mitigating circumstances" and "assess[] the defendant's personal culpability" in answering the issue necessarily shaped the scope of the proper inquiry the jurors were instructed to undertake. Essentially, the jurors were told to determine whether petitioner acted with sufficient deliberation that a death sentence would be "an appropriate

response to [his] personal culpability." Far from requiring the jurors to *depart* from their oath to render a true verdict on the special issues in order to give effect to petitioner's mitigating evidence, the instruction defined the inquiry before the jurors in such a way as to ensure that it would include full consideration of that evidence. Thus, an observation the Court has made in the past is particularly apt here: juries answering the special issues can "exercise a range of judgment and discretion *while remaining true to their instructions and their oaths.*" *Adams v. Texas*, 448 U.S. 38, 46 (1980) (emphasis added).

Petitioner's premise that jurors likely felt constrained to limit their evaluation of whether petitioner acted "deliberately" effectively to whether he acted "intentionally" is thus baseless. In light of the whole instruction there is no reason to think that reasonable jurors would feel restricted to a narrow conception of "deliberation" that would eliminate all the discretion that the court's express instruction so plainly gave them. Petitioner's effort to manufacture a purported conflict between the jurors' oath to render a true verdict on the issues and their ability to give effect to his mitigating evidence is thus entirely meritless.

Underlying petitioner's arguments is really an appeal to a much broader principle. Petitioner points to language from *Penry* suggesting that his mitigating evidence had "relevance to his moral culpability beyond the scope of the special verdict question." *Penry*, 492 U.S. at 322. Ultimately, petitioner's position rests on the proposition that, even if the instructions in this case did not *foreclose* the jury from giving effect to his mitigating evidence, restricting the manner in which the jury could consider the evidence by channeling it through the framework of the special issues was still improper. The error, in other words, was that the special issues constrained the consideration of petitioner's evidence at all, or, as petitioner puts it, the instruction here was unconstitutional because "[i]t

did not liberate the jury from the confining effect of the three 'special issues.'" Pet'r Br. 19.

That is a proposition, however, that has been specifically and repeatedly rejected by this Court. Responding to similar arguments in *Johnson*, the Court noted that accepting such a principle would require a sea change in the Court's jurisprudence. "Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Johnson*, 509 U.S. at 372. To do that would require overruling *Jurek v. Texas*, 428 U.S. 262 (1976), the decision that originally upheld the Texas system of structuring the evaluation of mitigating evidence through the special issues, and would mean abandoning the fundamental proposition that it is permissible for the State to guide a jury's evaluation of matters presented in mitigation. As the Court concluded in *Johnson*, the principle petitioner advances would "remove all power on the part of the States to structure the consideration of mitigating evidence – a result we have been consistent in rejecting." *Johnson*, 509 U.S. at 373.[5]

At bottom, petitioner's arguments do not rest so much on an application of this Court's precedents as on an emotional appeal. It was largely in response to this Court's decision in petitioner's own case, petitioner claims, that Texas modified the sentencing procedure for capital cases in 1991. The new procedure adds an additional special issue that expressly allows

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[5] *See also Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion) ("[T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.").

the jury virtually unchanneled discretion to decline to impose the death penalty based on its evaluation of mitigating evidence.[6] It would be a cruel irony, petitioner suggests, if, "while all Texas capital defendants now have the benefit of a 'Penry' question, Penry himself [were] deprived of such a question." Pet'r Br. 6. *See also* Br. of Amicus Nat'l Ass'n of Crim. Defense Lawyers 4-5.

The problem with this argument is that the new special issue Texas has adopted simply is not *required* by the federal Constitution. Indeed, in *Johnson*, the Court explicitly rejected the proposition that the sentencing jury must be instructed in a way that allows it to give effect to mitigating evidence in any manner it chooses and thus, in effect, "to depart from the special issues in every case." 509 U.S. at 373. *See also Graham v. Collins*, 506 U.S. 461, 476-77 (1993). As noted above, this Court has consistently held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)). And even as recently as last Term the Court reaffirmed the principle that "the State may structure the jury's consideration of mitigation so long as it does not *preclude* the jury from giving effect to it." *Weeks*, 528 U.S. at 232 (emphasis added).

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[6] The new procedure instructs the jury to consider "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Crim. Proc. Code Ann. art. 37.071 § 2(e)(1) (Vernon Supp. 1992).

Here, as explained above, the jury was fully able to give effect to all of petitioner's mitigating evidence through its consideration of the special issues. The mere fact that Texas now provides sentencing juries in capital cases even wider discretion to give effect to mitigating evidence through the use of an additional question does not make petitioner's sentence constitutionally infirm. And it certainly does not make the instruction given in his case an "unreasonable application" of the law existing at the time of his sentencing.

II. THE INTRODUCTION AT SENTENCING OF PSYCHOLOGICAL EVIDENCE FROM A PRIOR COMPETENCY EVALUATION DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHTS.[7]

A. The Peebles Report Was Properly Admitted As Rebuttal Evidence Under *Buchanan v. Kentucky*.

Petitioner goes to great lengths in an effort to establish that, when the prosecution introduced the report that resulted from Dr. Peebles' un-*Mirandized* examination of petitioner, Dr. Peebles could properly be considered an "agent of the State." As a result, petitioner claims, the protections of the Fifth Amendment under *Estelle v. Smith*, 451 U.S. 454 (1981), should apply. *See* Pet'r Br. 29-40. But petitioner's narrow focus on whether Dr. Peebles was an agent of the State, and thus whether his examination of petitioner broadly came within the ambit of Fifth Amendment protections, is largely beside the point for the simple reason that the report was properly

[7] Petitioner does not raise a Sixth Amendment claim, probably because Dr. Peebles' examination was conducted at petitioner's counsel's request. *See Penry v. State*, 903 S.W.2d 715, 759 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977 (1995).

admitted as rebuttal evidence under *Buchanan v. Kentucky*, 483 U.S. 402 (1987).

In *Buchanan*, the Court explained one of the limitations inherent in its holding in *Estelle*:

> [I]f a defendant requests such [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

483 U.S. at 422-23. As the Court later explained, *Buchanan* "held that the defendant waived his Fifth Amendment privilege by raising a mental-status defense." *Powell v. Texas*, 492 U.S. 680, 685 (1989). *Buchanan* thus recognizes the principle that a defendant who puts his mental status at issue and presents psychological evidence should not be permitted to appeal to the Fifth Amendment to block rebuttal evidence in the form of psychiatric reports – even if the examinations underlying the reports were conducted in a manner that in other circumstances might allow the defendant to raise a Fifth Amendment claim. *See Schneider v. Lynaugh*, 835 F.2d 570, 575-76 (5th Cir.), *cert. denied*, 488 U.S. 831(1988). As the Fifth Circuit explained, "[i]t is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." *Id.* at 576.

Petitioner undisputedly presented psychiatric testimony and evidence concerning his mental status in putting on his case. Through his expert, Dr. Price, he sought to establish that his violent behavior was attributable to his mental retardation and background of childhood abuse. Thus, Dr. Price testified

that, in his opinion, "the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry," J.A. 2:414, and that "brain impairment of this type, causes the person problems in areas such as . . . impulse control." *Id.* at 279. Petitioner sought to use this evidence concerning his mental status and its effect in reducing his control over his violent behavior to argue that he bore reduced culpability for his actions. In response, the prosecution relied on the Peebles report to emphasize another aspect of the mental characteristics petitioner's expert had stressed and their effect on petitioner's violence – namely, that petitioner was likely to be violent in the future.

The claim that this use of the report was not proper rebuttal is baseless. According to petitioner, the Peebles report could not be rebuttal because petitioner did not present psychiatric evidence directed precisely at addressing the issue of future dangerousness. *See* Pet'r Br. 41. But that attempts to parse the issues far too narrowly. Petitioner put on evidence concerning his mental status and the effect that his mental impairments had on his violent behavior. It was certainly fair rebuttal for the State to point out that the very same conditions on which petitioner was basing his arguments – and which petitioner himself was linking to his violent behavior – also had relevance to whether petitioner would be dangerous in the future. In short, simply because petitioner did not want to use his psychological evidence to argue to the jury specifically concerning future dangerousness does not mean that the State must be barred from using psychiatric evidence to address that issue when the evidence was plainly relevant to the same subject on which petitioner's expert had testified – namely, the nexus between petitioner's retardation and abused background and his violent conduct.

Petitioner also overlooks the fact that the Peebles report was admitted into evidence on cross examination of petitioner's own expert, Dr. Price, after he testified that he had relied on the

report in forming his opinions. *See* J.A. 2:327, 345-47. If the principle announced in *Buchanan v. Kentucky* is to make any sense, then it surely is broad enough to ensure that, where the defendant puts on his own psychiatric expert and that expert relies for his opinions on a report from an earlier examination of the defendant (even if that examination took place in an un-*Mirandized* custodial setting), the full report can be introduced into evidence upon cross examination and used by the State. Any other result would suggest a rule that would undermine the proper functioning of the adversary system as a search for truth. It would suggest that a defendant could have his expert selectively pick and choose portions of a document on which to base his opinions and could then appeal to the Fifth Amendment to shield any unfavorable aspects of the very same report from the jury's view. Such a result simply is not dictated by the Fifth Amendment or *Estelle v. Smith*.

B. Even If There Was Some Error In Admitting the Peebles Report, the Error Was Harmless.

A trial-type error such as the purported Fifth Amendment violation that petitioner assigns to the introduction of the Peebles report is subject to harmless error review. *See, e.g.*, *Chapman v. California*, 386 U.S. 18 (1967). On collateral review, moreover, the *Chapman* standard for harmless error review (under which error must be proved harmless "beyond a reasonable doubt") does not apply. Rather, on federal *habeas* review, the test for harmlessness is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), which requires that the error must have resulted in "'actual prejudice.'" *Id.* (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). In this case, even if the introduction of the Peebles report at sentencing was error, it was harmless under the *Brecht* standard.

Petitioner focuses his attack entirely on the statement in the Peebles report "that if Johnnie Paul Penry were released from custody . . . he would be dangerous to other persons." J.A. 1:60. According to petitioner, that statement had a devastating impact on the jury's consideration of the second special issue.

The Peebles report, however, was merely cumulative evidence on the subject of petitioner's dangerousness. To begin with, the jury could readily infer from petitioner's criminal record and the heinous and brutal nature of this crime that he would continue to be dangerous in the future. Petitioner, after all, had only recently been released from jail on a prior rape charge when he committed the attack at issue here. The jury also had before it evidence of petitioner's particularly callous attitude toward the crime in his confessions. The Peebles report, moreover, was not the only expert evidence that addressed petitioner's dangerousness. As the court of appeals noted, the prosecution also introduced the testimony of Dr. Quijano, who concluded that petitioner "had an antisocial personality disorder which made him more likely to be violent in the future." 215 F.3d at 511. Indeed, petitioner's *own expert*, Dr. Price, admitted upon cross examination that, if petitioner "was in the free world, I would consider him dangerous." J.A. 2:392. If any evidence presented to the jury amounted to a "devastating statement about Penry's dangerousness," Pet'r Br. 42, surely it was that condemnation from the mouth of Penry's own expert.

When the jury had all of these other sources of evidence to draw upon clearly suggesting petitioner's future dangerousness, it simply cannot be said that the single statement in the Peebles report "substantial[ly] . . . influenced" the jury's verdict. *Brecht*, 507 U.S. at 637. Thus, even if it was error to admit the report, the error was harmless.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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